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IN THE

Supreme Court of the United States

October Term, 1985

AMERICAN POSTAL WORKERS UNION, AFL-CIO, NEW LONDON CONNECTICUT AREA LOCAL; CONNECTICUT STATE POSTAL WORKERS UNION, APWU, AFL-CIO; and PHILIP N. DANKO,

Plaintiffs-Petitioners,

against

UNITED STATES POSTAL SERVICE,

Defendant-Respondent.

PETITION (WITH APPENDIX) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT A CANTORE
Attorney for Plaintiffs-Petitioners
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

Of Counsel:
VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.

Questions Presented for Review

1. Can the discharge of a federal employee for exercising rights arguably protected by the First Amendment to the Constitution of the United States constitute a genuinely extraordinary situation warranting a finding of irreparable harm and the issuance of a preliminary injunction?

2. Can such a discharge "chill" the First Amendment rights of similarly situated federal employees represented by the petitioning unions? If so, can that chill be "thawed" by the issuance of preliminary, as opposed to permanent relief?

Parties Below

The parties named in the caption are all of the parties to the proceeding in the Court of Appeals and in the District Court. The petitioning unions are both subordinate bodies of the American Postal Workers Union, AFL-CIO.

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UNITED STATES POSTAL SERVICE,
Defendant-Respondent.

Preliminary Statement

Petitioners, American Postal Workers Union, AFL-CIO, New London Connecticut Area Local ("the Local"), Connecticut State Postal Workers Union, APWU, AFL-CIO ("the CSPW", collectively "the Unions") and Philip N. Danko ("Danko"), respectfully petition the Supreme Court of the United States to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Second Circuit").

The opinions of the United States District Court for the District of Connecticut ("District Court") are reported at 595 F.Supp. 403 (D. Conn. 1984) and are reproduced in

the Appendix, *infra* at 18a and 27a.[1] The opinion of the Second Circuit was not officially reported at the time this petition was printed but is unofficially reported at 119 LRRM 3448 (2d Cir. 1985) and is reproduced in the Appendix, *infra* at 1a.

Jurisdictional Statement

The Second Circuit issued its opinion and order reversing an order of the District Court on July 3, 1985. (1a). Petitioners' application for rehearing with suggestion for rehearing *en banc* was denied on September 10, 1985. (16a). This petition was filed within ninety (90) days of that decision.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

This case involves the rights of federal employees under the First Amendment to the Constitution of the United States and the relief to which they are entitled while an extra judicial tribunal, in this case a labor arbitrator, decides, in the first instance, the issue of whether or not those rights have actually been infringed upon. The First Amendment reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

1. References followed by "a" are to the Appendix to this petition. References denoted by "JA- —" are to the Joint Appendix before the Second Circuit.

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

In the District Court, petitioners successfully moved for an order preliminarly enjoining respondent United States Postal Service ("Postal Service") from discharging petitioner Danko pending arbitration of the discharge pursuant to the provisions of a collective bargaining agreement between respondent and the Unions' parent, the American Postal Workers Union, AFL-CIO ("APWU"). (26a). In granting petitioners their requested relief, the District Court found, *inter alia*, (i) that it had jurisdiction over the case, (ii) that petitioners had demonstrated that the sole cause of Danko's discharge—a letter to Mystic Color Labs ("Mystic"), the largest Postal Service customer in Connecticut, stating that Mystic's mail was late—was likely protected by the First Amendment, and (iii) that the harm to Danko's First Amendment rights and the potential chilling effect on the First Amendment rights of the remaining members of the Unions would be irreparable and would therefore constitute a "genuinely extraordinary situation" within the exceptions to this Court's holding in *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974).

On appeal, the Second Circuit held that the District Court had jurisdiction and that it did not abuse its discretion in finding that the Mystic letter addressed a matter of "public concern" and thus was arguably protected by the First Amendment. (12a). The Court concluded, nonetheless, that the District Court "abused its discretion in

awarding an injunction" (10a) because "appellees herein have failed to allege a clear-cut infringement of first amendment rights" (12a). In so holding, the Circuit reversed the findings of irreparable harm by the District Court and found that "the discharge in question . . . does not create a chilling effect on appellees' first amendment rights." (3a).[2]

The Relevant Facts

In the Spring of 1984, a dispute arose between the Local and the Postal Service when the Postal Service decided to "excess", i.e. eliminate, fourteen positions at the New London Post Office. (3a; 18-19a; JA-7, ¶13; JA-21, ¶6). The Local claimed that the "excessing" violated the collective bargaining agreement between the Postal Service and the APWU ("the Agreement") (JA-26) and also that it resulted in delays in the mail. (3a; 19a; JA-21, ¶7). The Local publicized this claim in three ways:

(1) By writing to elected officials (JA-7-8, ¶14; JA-21, ¶7);

(2) By having its officers, including Danko, give interviews to the press, which were subsequently reported (*id.*); and

(3) By sending a letter to Mystic, a mail order film processing company and the largest customer of the Postal Service in the Connecticut Valley, which

2. The Second Circuit also found that the injunction was not "required in order to aid the arbitration." (14a). However, this issue and the issue of irreparable harm are "closely related." *Local Lodge No. 1266* v. *Panoramic Corp.*, 668 F.2d 276, 286 (7th Cir. 1981); *Cf. Local 553, TWU* v. *Eastern Airlines, Inc.*, 695 F.2d 668 (2d Cir. 1982). Petitioners respectfully submit that if the Circuit erred in its finding on irreparable harm, then it erred in its finding of no need to aid the arbitration.

> Danko signed as president of the Local. (JA-8, ¶15; JA-21, ¶7; JA-54).

(3a, 19a).

Each method of publicity repeated, *inter alia*, the same basic charge: the mail was being delayed. (3a; JA-47, 48, 50, 51, 52, and 54). The letter to Mystic expressed that charge in its opening sentence:

> The purpose of this letter is to make you aware of the fact that large amounts of your film mailers are not being processed for outgoing dispatch or incoming delivery.

(4a; JA-54). Although the Postal Service has since contended that Mystic's mail was not late (4a; JA-99), its own postal inspector reported, following an investigation, that Mystic believed its mail was "arriving a day later than usual." (JA-57).[3]

Following this investigation by its postal inspector, the Postal Service concluded that the Mystic letter, but not the "untrue" press interviews or the "false" letters to elected officials, constituted conduct prejudicial to the interest of the Postal Service, in violation of the Code of Ethical Conduct, 39 CFR 447.11 *et seq.*[4] (4a; 19a; JA-59 and JA-72). Respondent determined that the act of signing the Mystic

3. Petitioners continue to claim that the delays occurred, while respondent continues to claim that this is "untrue" and "inaccurate." (4a). All parties agree, however, that resolution of this factual dispute is for the arbitrator, at least in the first instance.

4. The Postal Service has apparently concluded that the First Amendment rights of free press and to petition elected officials for the redress of grievances enjoy a higher priority than the First Amendment right of free speech even though "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

letter was sufficient cause under the Agreement to warrant Danko's discharge, and fixed July 26, 1984 as its effective date. (19a; 4a; JA-72).

As a result of this determination, the Local, with Danko, took three courses of action:

(1) if filed a charge, which Danko also signed, with the National Labor Relations Board ("NLRB") alleging that Danko's discharge violated rights guaranteed by Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157, (6a; 19a, n.1; JA-91);

(2) it filed a grievance in accordance with the terms of the Agreement (6a; 19a; JA-8-9, ¶17); and

(3) it filed the complaint in the instant action, in which it was also joined by the CSPW, seeking declaratory and injunctive relief partially in aid of the second course of action. (6a).

The complaint (JA-4) alleged four separate reasons why Danko should not be discharged:

(1) that the discharge was not for "just cause" as that term is used in the Agreement (JA-7);

(2) that the discharge violated petitioners' rights guaranteed by the First Amendment (JA-10);[5]

5. The complaint alleged, *inter alia,* that:

25. The May 27, 1984 letter was on a subject of concern to Mystic Color Lab and other members of the General Public. By sending the letter, Danko and New London were peaceably exercising rights guaranteed them by the First Amendment to the Constitution of the United States.

26. The actions of the Postal Service in discharging Danko were wilfully and maliciously designed to and have had the effect of chilling, deterring, preventing and inhibiting plaintiffs from

(footnote continued on next page)

(3) that the discharge violated Danko's rights guaranteed by Section 1209(c) of the Postal Reorganization Act, 39 U.S.C. §1209(c) (JA-11); and

(4) that the discharge violated Danko's rights guaranteed by the Fifth Amendment to the Constitution of the United States (JA-13).

On July 24, 1984, petitioners moved, by order to show cause, for a preliminary injunction staying Danko's discharge pending the grievance and arbitration procedure. (6a; 19a; JA-17, 88). Petitioners' motion, which was originally returnable on August 3, 1984, was not heard until August 8, 1984 due to the District Court's busy calendar. The parties had voluntarily extended a temporary restraining order until then. (JA-35-37). Prior to the August 8, 1984 hearing, the Postal Service cross-moved to dismiss the complaint, primarily challenging the jurisdiction of the District Court.

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the free exercise of their right of speech under the first amendment of the Constitution of the United States and directly interferred with the exercise of that right.

27. The malicious actions of the Postal Service described above violated rights of Danko and New London under the First Amendment to the Constitution of the United States.

28. Plaintiffs will suffer severe and irreparable injury by virtue of defendant's acts as set forth above. The fundamental constitutional rights of Danko and New London have been violated and will continue to be violated, and the acts of defendant are chilling and deterring the free exercise of the rights of speech, association, assembly, and press enjoyed by Danko and other members of New London and CSPW.

29. Plaintiffs have no plain, adequate or complete remedy at law to redress this violation of the constitutional rights of Danko and New London.

30. Plaintiffs are entitled to a declaratory judgment that the discharge of Danko is illegal and in violation of constitutional rights of Danko and New London.

(JA-10-11).

Based on the facts alleged in the complaint and affidavits submitted with the motion, petitioners pressed their motion for the preliminary injunction. They contended that they were entitled to a preliminary injunction because the undisputed facts demonstrated, *at a minimum*:

(1) that there were four justiciable issues which are arbitrable, in the first instance, under a labor agreement;

(2) that they and their members would suffer irreparable harm if the injunction did not issue;

(3) that the balance of hardships tipped decidedly in their favor; and

(4) that the injunction was necessary to preserve the arbitral process.

In his August 14, 1984 opinion, Senior District Judge M. Joseph Blumenfeld held that petitioners were likely to succeed in establishing that Danko's activity in signing the Mystic letter was protected by the First Amendment. (24a; 595 F.Supp. at 408). The District Court made no findings on the other three claims raised in the complaint. *Id.*

The District Court also found that the potentially chilling effect on the First Amendment rights of Danko *and* the other members of the Unions constituted irreparable harm (23a; 595 F.Supp. at 480) and that the balance of equities tipped decidedly in their favor (24a n.7, 37a; 595 F.Supp. at 408 n.7, 413). Finally, the Court found that the injunction was necessary to preserve the jurisdiction of the arbitrator and issued the injunction. (25a; 595 F.Supp. at 409).

In moving for reconsideration, the Postal Service primarily challenged the jurisdiction of the District Court to

issue the injunction, as it did in its original motion to dismiss the complaint. (27a; 595 F.Supp. at 409). Once again, the District Court dismissed respondent's contentions and "adhered to" its prior decision. (38a; 595 F.Supp. at 413).

In is opinion reversing the decisions of the District Court, the Second Circuit affirmed each of the District Court's findings except on the issue of irreparable harm and the closely related issue of preserving the jurisdiction of the arbitrator. The Second Circuit not only found that petitioners' complaint failed "to allege a clear-cut infringement of [Danko's] first amendment rights" (12a), but that "the discharge in question . . . does not create a chilling effect on appellees' first amendment rights" (3a) and, finally, that

> . . . we fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction.

(13a).

Shortly after the Second Circuit rendered its decision, but before its mandate issued and while the petition for rehearing was still pending, the Postal Service unilaterally reduced Danko's discharge to a fourteen-day suspension. The Second Circuit was informed of this development before it denied rehearing and, thus, before its mandate issued. Shortly after the Court denied the petition for rehearing, Danko was suspended for two weeks. The arbitration is now scheduled to take place on December 20,

1985 and is likely to be concluded within thirty days thereafter.

Reasons for Granting the Writ

A. The Decision Below Is in Square Conflict with the Decision of the Fourth Circuit in *Johnson* v. *Bergland*, 586 F.2d 993 (4th Cir. 1978) and with the Decision of the Eleventh Circuit in *Purolator Armored, Inc.* v. *NLRB*, —— F.2d ——, 119 LRRM 3228 (11th Cir. 1985)[6]

The decisions of the Second Circuit and the Fourth Circuit are in square conflict as to whether an adverse action taken against a federal employee in violation of arguable First Amendment rights constitutes a genuinely extraordinary situation warranting a finding of irreparable harm.

In *Johnson*, the Fourth Circuit was faced with the mere transfer (both as to title and geographic location) of a federal employee in violation of what were only arguable First Amendment rights. Johnson, a Republican, was transferred from his position as the State Director of the federal Farmers Home Administration for North Carolina to the position of a Program Assistant in Mississippi by the then Democratic administration, allegedly for partisan political purposes. 586 F.2d at 994, 996. As the dissent pointed out, however, there was a very good chance that Johnson's former job was a "policy-making position" and thus not protected by the First Amendment as explained

6. Like the decision in this case, the Eleventh Circuit's opinion was not officially reported at the time this petition was printed.

in this Court's decision in *Elrod* v. *Burns*, 427 U.S. 347 (1976). *Id.*

Nonetheless, on the *chance* that Johnson's First Amendment rights *might* be involved, the Fourth Circuit held that:

> . . . the fact that he was *relocated* in a distant state shortly after being placed in the Program Assistant position would suffice to establish an infringement of his first amendment rights. Violations of first amendment rights constitute *per se irreparable injury*.

586 F.2d at 995. (Emphasis added).

Here, the District Court and petitioners had relied upon this Court's holding in *Elrod* v. *Burns* to support two propositions: (1) that Danko's discharge had a potentially "chilling effect" on the First Amendment rights of the Unions and their members, and (2) that his discharge immediately impaired the individual First Amendment rights of Danko himself. Thus, the District Court and petitioners reasoned that a "genuinely extraordinary situation" existed within the exception to this Court's general prohibition of irreparable harm findings in discharge of federal employee cases. *Sampson* v. *Murray*, 415 U.S. at 92 n.68. In seeking to distinguish *Elrod* (13a), however, the Second Circuit failed to consider the District Court's finding that Danko's discharge immediately impaired his individual First Amendment rights (23a, 33-34a; 595 F.Supp. at 408, 411-12) and, as discussed below, dismissed the "chilling effect" rationale with the flick of a wrist.

In *Elrod*, every person employed by the Sheriff's office who was not affiliated with or sponsored by the Democratic Party was discharged except for one plaintiff who was

threatened with discharge. 427 U.S. at 351. Thus, there were no Republicans or independents remaining whose First Amendment rights could be "chilled" by the challenged actions. Nonetheless, and as the Second Circuit correctly acknowledged, " '[i]t [was] clear . . . that First Amendment interests were either threatened or in fact being impaired *at the time* [*injunctive*] *relief was sought*.' " (13a; emphasis added).

Thus, this Court necessarily relied upon the harm to the plaintiffs' own constitutional rights to justify issuance of an injunction. In essence, this Court held that each plaintiff's First Amendment right to be a Republican was impaired by his discharge or threatened discharge (1) even though he had the right to remain a Republican while he challenged the discharge in court, and (2) even though he would suffer no personal injury greater than that suffered by Danko if allowed to be discharged pending resolution of the propriety of the action. Thus, this Court "agree[d]" with the decision of the Seventh Circuit (427 U.S. at 373) directing the district court to, *inter alia*, enjoin the discharges pending a trial on the merits. *Burns* v. *Elrod*, 509 F.2d 1133, 1136 (7th Cir. 1975).

In direct conflict with the Second Circuit's approach to the issue, the Seventh Circuit had held:

> The district court's order, by holding that the loss of employment does not constitute sufficient irreparable harm and that the plaintiffs have an adequate remedy at law, suggests that a preliminary injunction would never be appropriate in this type of case. We must reject this conclusion, *for clearly more is involved than a simple loss of employment*. What lies at the heart

> of these cases is the constitutional right of governmental employees to associate freely with political groups of their choice without official reprisal for such affiliation.

509 F.2d at 1136. (Emphasis added, citations omitted).

Although *Elrod* v. *Burns* involved state, not federal, employees and the First Amendment right of association, not speech, petitioners are unaware of any decision limiting *Elrod* to state employees or associational rights. The Fourth Circuit, in *Johnson*, applied *Elrod* to federal employees and "*speech* on public issues occupies the '*highest* rung of the hierarchy of First Amendment values,' and is entitled to *special* protection." *Connick* v. *Meyers*, 461 U.S. 138, 145 (1984). (Emphasis added, citations omitted).

Here, Danko's right of free speech was no less impaired or infringed upon by his discharge than were the *Elrod* plaintiffs' right of freedom of association. Had the Second Circuit properly applied *Elrod*, as the Fourth Circuit had done in *Johnson*, it would have affirmed the District Court's order. Instead, the Second Circuit held that the fact that Danko was *discharged* for what was found to be in violation of, at the very least, equally arguable First Amendment rights does not "demonstrate sufficient injury to justify a finding of irreparable harm," much less "per se irreparable injury". (12a). Had the Second Circuit written the opinion in *Johnson*, petitioners can only conclude that it would have read like this:

> Herein, to the contrary, we do not find that [Johnson's] first amendment right to [hold a non-policymaking position] was threatened by [his relocation], pending

> [trial on the merits], [from an] allegedly [policy-making position].

(13a).

Furthermore, the decisions of the Second Circuit and the Eleventh Circuit are in square conflict as to whether the retaliatory discharge of a visible employee establishes that a chilling effect is reasonably foreseeable. Here, the Second Circuit held that the discharge alone of a highly visible union president failed to demonstrate that it "would have a chilling effect on appellees' exercise of their first amendment rights, sufficient to constitute irreparable harm" since that was but a "conclusory assertion". (12-13a). Conclusory or not, the Eleventh Circuit, in *Purolator Armored, Inc.*, held:

> The proximity between terminated and non-terminated employees provides both evidence of an intent to chill and evidence that a chilling effect was reasonably foreseeable.

119 LRRM at 3234.

Although the Eleventh Circuit's opinion involved the alleged chilling of employees' rights guaranteed by Section 7 of the National Labor Relations Act, 29 U.S.C. §157, and not the First Amendment, once again, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. at 145. (Citations omitted). Thus the Second Circuit and the Eleventh Circuit are in conflict as to whether the discharge of a visible employee for exercising a protected right constitutes evidence of a reasonably foreseeable chilling effect on the exercise of that right by non-terminated employees.

B. The Second Circuit's Decision Is a Vast Departure From the Existing Case Law

In reviewing the instant grant of interlocutory relief, the Second Circuit was limited to considering "whether issuance of the injunction constituted an abuse of discretion." *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). In finding that it was an abuse of discretion for the District Court to have made a finding of irreparable injury, however, the Second Circuit did not limit itself to the record of this case. Instead, it decided this question on the basis of a sweeping reassessment of the law of retaliatory discharge.

In making its decision, the Second Circuit held:

> More importantly, as appellant argues, we fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction.

(13a).

Petitioners simply cannot fathom why the Second Circuit "fail[ed] to understand how" the "chill" created by an unimpeded retaliatory discharge would not be "thawed" by the entry of an interim injunction. Employees remaining on the job after their cohort has been fired for arguably protected speech are not likely to draw the rarified distinctions that the Circuit draws between "interim" and "permanent" discharge. From the perspective of non-terminated employees, the compelling distinction is whether the terminated employee is on the job and thus able to pay

his bills or off the job without such an ability while some tribunal wrestles with the legal niceties of the dispute.

If the terminated employee returns to the job, even temporarily, his co-workers must conclude that *some* immediate protection is available to those who exercise their right to speak out on matters of public concern. If the terminated employee does not immediately return, however, the message rings clear with each passing day: the price of free speech is an inability to meet monthly expenses while some tribunal, in this case an arbitrator, decides whether the discharge was improper.[7] Thus, the fact of discharge, even "interim discharge", conveys a more onerous message than the threat of such action. And the fact of discharge of a union president, to whom the co-workers look for protection, constitutes still more onerous news.

During the year and a half that the propriety of Danko's discharge (now suspension) has pended in arbitration, the fact that he had been at work and earning pay necessarily had thawed the chill to his co-workers, the members of the petitioning unions. As the District Court observed, Danko's return to the workplace, even under the threat of discharge,

> . . . demonstrates that there are courts which will interfere, intervene to protect the rights, without deciding . . . that he couldn't be fired.

(JA-160).

Absent such a demonstration, even a final award in Danko's favor could not thaw the chill or vitiate the ir-

7. Here Danko has waited over a year for such a ruling and the date has just been set to hear his case.

reparable harm suffered by the non-terminated members of the Unions. While the loss of salary and the consequential damages which ordinarily flow from such a loss may not constitute irreparable harm absent extraordinary circumstances (*Sampson* v. *Murray*), the "inconvenience" of being out of work, the fear for one's family and the danger of losing one's home, car and other possessions during the indeterminate wait for one's case to be heard is more than enough to muzzle any postal employee who might otherwise expose some *truthful* violation by respondent of the Congressional mandate for speedy delivery of the mail. *See* 39 U.S.C. §101.

Simply put, while Danko's fellow employees await final disposition of the Postal Service's claim that Danko's statements to Mystic were false, it cannot be said that the District Court abused its discretion in finding that their right to speak allegedly truthful statements about the Postal Service will be chilled. By rejecting not only the District Court's finding but also the logic underlying that finding, the Second Circuit departed from the rationale for this Court's holdings in *Elrod* v. *Burns* and expanded *Sampson* v. *Murray* far beyond its intended scope.

Taking the Second Circuit's statement to its logical conclusion, even if the statements in the Mystic letter were true, even if Danko were discharged solely for making truthful statements on matters of public concern, and even if Danko's discharge led union stewards to resign in fear and led other union members to cease publicly criticizing respondent's practices, no injunction could issue as a matter of law since the Second Circuit "fail[ed] to understand how" the threat of permanent discharge is "vitiated by an interim injunction."

It matters not that the instant case involved First Amendment rights of speech, rights "entitled to special protection" *Connick* v. *Myers*, 461 U.S. at 145, since the principle stated by the Second Circuit is clearly broad enough to cover discharges chilling rights protected by Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.*, Section 7 of the National Labor Relations Act, 29 U.S.C. §157, the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, or any other right conferred by Congress or the Constitution. Thus, the Second Circuit's principle undermines not only the substantive rights conferred by those provisions but, more importantly, the federal courts' power to protect the continued free exercise of those rights in appropriate cases.

C. The Case Is Not Moot

"Simply stated, a case is moot when the issues presented are not longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Here, the issues remain alive despite the unilateral modification of Danko's discipline from discharge to a suspension which has now been fully served.

Respondent could have voluntarily reduced Danko's discharge to a suspension before the action was filed, after the action was filed but before the District Court's decision or after the District Court's decision but before that of the Second Circuit. Instead, the Postal Service waited until it had obtained a favorable decision from the Second Circuit before taking its unilateral action arguably rendering the action moot.

Petitioners do not mean to suggest that respondent reduced Danko's discipline in order to avoid this Court's review. Indeed, they welcome its change of heart even though it came so late and did not go far enough. Yet clearly respondent remained interested enough in the outcome to withhold the reduction until *after* it had obtained the Second Circuit's review and "voluntary cessation of alleged illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Moreover, in their complaint, petitioners seek declaratory as well as injunctive relief with respect to Danko's discharge, now suspension, and they are still entitled to that declaration.

Finally, this is not the first time that Danko, the Local or other members and/or locals affiliated with the CSPW engaged in the sort of conduct which resulted in Danko's discharge/suspension. As Danko stated in his affidavit submitted in support of the motion for the preliminary injunction:

> 4. During my many years as a union officer, New London and I have been vocal critics of management's efforts to run the Postal Service. Beginning in about 1976, New London and I have charged postal officials with use of the Postal Service employees for personal profit, nepotism in the hiring of Postal Service employees, and the falsification of employee time-cards.
>
> 5. As a result of these activities, I have once before been threatened with discharge, "no matter how long it takes." That threat resulted in the settlement of a charge then pending before the National Labor Relations Board in which the Postal Service promised not to threaten me with discharge for engaging in activities

> protected by Section 7 of the National Labor Relations Act of 1947, as amended, 29 U.S.C. §157.
>
> * * *
>
> 8. This public airing of our dispute is not the first time the New London and I have engaged in such activity. During a similar dispute in 1979, I wrote to Mystic Color Lab concerning an issue arising out of the Postal Service's excessing of distribution clerks at the New London.

(JA-20, 21).

Similarly, in 1977, the Stamford Connecticut Area Local, another local affiliated with the CSPW, distributed leaflets accusing the Postal Service with not only delays in the mail but also with instructing postal workers "to alter the dating labels" to hide the delays. (JA-80). Between 1980 and 1982, the same local and its then president, Lawrence Bocchiere, who is now president of the CSPW, engaged in a letter-writing campaign designed to thwart the Postal Service's plans to relocate its Stamford, Connecticut mail processing facility. (JA-82-87). The effort predicted, *inter alia,* resulting delays in the mail. (JA-82).

There is every reason to expect that Danko, the Local, the other locals and members affiliated with the CSPW and the CSPW itself will continue these activities into the future, at least if their will to do so has not been completely chilled by Danko's discipline and the Second Circuit's decision. If they do, and the members and/or officers signing the letters are suspended for any amount of time up to eighteen months (the time it has taken Danko's case to reach arbitration), the propriety of injunctive relief could never be reviewed by this Court if this case is moot.

In *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 109 (1978), this Court held that:

> . . . even in the absence of a class action a case is not moot when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the same action again." *Weinstein* v. *Bradford, supra,* at 147, 46 L.Ed.2d 350, 96 S.Ct. 347 (emphasis added).

This case not only meets this two pronged test, it is a form of class action brought by the Unions for the benefit of their members. It is thus hardly moot.

Conclusion

Since the Second Circuit's decision conflicts with decisions of the Fourth and Eleventh Circuits, since it departs from this Court's holding in *Elrod* v. *Burns* and expands this Court's decision in *Sampson* v. *Murray* far beyond its intended scope and since the case is not moot, this Court should issue a writ of certiorari to the Second Circuit.

Respectfully submitted,

ROBERT A CANTORE
Attorney for Plaintiffs-Petitioners
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

Of Counsel:
VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 963—August Term, 1984

(Argued: April 9, 1985 Decided: July 3, 1985)

Docket No. 84-6329

AMERICAN POSTAL WORKERS UNION, AFL-CIO, NEW LONDON CONNECTICUT AREA LOCAL, CONNECTICUT STATE POSTAL WORKERS UNION, APWU, AFL-CIO, and PHILIP N. DANKO,
Plaintiffs-Appellees.

v.

UNITED STATES POSTAL SERVICE,
Defendant-Appellant.

Before:

KEARSE, PIERCE, and PRATT, *Circuit Judges.*

Appeal from an order of the United States District Court for the District of Connecticut (Blumenfeld, *Judge*) preliminarily enjoining the United States Postal Service from discharging appellee Philip N. Danko while he and his union challenge the discharge through the grievance and arbitration procedures of a collective bargaining agreement.

Reversed.

ROBERT A. CANTORE, New York, New York (Robert B. Stulberg, Vladeck, Waldman, Elias & Engelhard, P.C., New York, N.Y., of counsel), *for Plaintiffs-Appellees.*

HAROLD KRENT, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Acting Assistant Attorney General, Alan H. Nevas, United States Attorney, Mark H. Gallant, Senior Appellate Counsel, Civil Division, Department of Justice, Washington, D.C., Louis A. Cox, General Counsel, Steven E. Alpern, Associate General Counsel, Howard J. Kaufman, Senior Attorney, United States Postal Service, Washington, D.C., of counsel), *for Defendant-Appellant.*

PIERCE, *Circuit Judge:*

The United States Postal Service (Postal Service) appeals from an order of the United States District Court for the District of Connecticut (M. Joseph Blumenfeld, *Judge*), dated October 18, 1984, preliminarily enjoining the Postal Service from discharging appellee Philip N. Danko while he and his union challenge the discharge through the grievance and arbitration procedures of a collective bargaining agreement. The Postal Service alleges that the district court lacked jurisdiction to issue the preliminary injunction, and also that, even if it had jurisdiction, it abused its discretion in exercising it. In particular, the Postal Service contends that the injunction was improperly issued because it was not in aid of arbitration, and also because appellees have failed to demonstrate the existence of irreparable harm. Appellees contend that the district court did have jurisdiction to issue the preliminary

injunction, that the preliminary injunction was in aid of arbitration, and also that the discharge in question would have a chilling effect on their first amendment rights, thereby providing the requisite irreparable injury for injunctive relief.

We hold that the district court did have jurisdiction to issue the preliminary injunction. We conclude, however, that the injunction herein was not in aid of arbitration, and also that the discharge in question, pending resolution of the grievance and arbitration process, does not create a chilling effect on appellees' first amendment rights. We therefore hold that appellees have failed to demonstrate the existence of conditions which are necessary for the issuance of a preliminary injunction in an employment dispute subject to arbitration.

Background

In the Spring of 1984, the United States Postal Service decided to "excess," i.e. eliminate, fourteen employees at the New London Post Office and transfer a number of those employees to other offices in Connecticut. The New London Connecticut Area Local (Local) of the American Postal Workers Union, AFL-CIO (APWU), claimed that the excessing violated the collective bargaining agreement between the Postal Service and APWU and also that it resulted in delays in the mail. The Local publicized this claim in three ways: 1) by writing to elected officials; 2) by contacting local newspapers; and 3) by sending a letter, dated May 27, 1984, and signed by Danko, as president of the union, to Mystic Color Lab (Mystic), a mail order film processing company and one of the largest customers of the New London Post Office. The letter informed Mystic

that, as a result of the elimination of the fourteen positions, its mail was being delayed.

The letter to Mystic stated in pertinent part:

> The purpose of this letter is to make you aware of the fact that large amounts of your film mailers are not being processed for outgoing dispatch or incoming delivery. This situation has been going on for some time now. Postal management will not make you aware of this, in fact they would most likely deny it if questioned about it.

Danko purported to "see first hand the amount of [Mystic's] mail that is delayed, on a nightly basis," and then went on to suggest that the delays were connected with the excessing of positions at the New London Post Office.

Following an investigation by a postal inspector, the Postal Service concluded that the letter to Mystic, although not the press interviews or the letters to elected officials, constituted "conduct prejudicial to the interest of the Postal Service," in violation of sections 661.12 and 661.3 of the Ethical Code of the Employee Labor Relations Manual, which subjects employees to disciplinary action, including discharge, for actions which adversely affect the public confidence in the integrity of the Postal Service.

On June 25, 1984, the Postal Service served Danko with a 30-day advance notice of proposed removal. The notice informed Danko that he had "recklessly and knowingly" conveyed "untrue" and "inaccurate" information "to a major customer with the intent of generating hostility towards [his] employer and damaging the image of an efficient Postal Service." Although the Postal Service contends that the correspondence with the press and elected officials also contained false accusations, the proposed re-

moval was based exclusively on Danko's letter to Mystic. The notice further informed Danko that he could contest the proposed dismissal under the grievance and arbitration procedure set forth in the collective bargaining agreement.

Danko responded in person to the charges on July 2, 1984, contending, *inter alia*, that he had the right to send the letter in question to Mystic because of his status as president of the local union. The Postal Service rejected all of Danko's alleged defenses. In particular, the Postal Service stated that "[t]he fact that [Danko is] a union officer does not cloak [him] with blanket immunity against appropriate action against impermissible misconduct."

On July 9, 1984, a notice of removal was issued informing Danko that the charges had been sustained and that he would be removed from service effective July 26, 1984. The notice further stated that, as a "preference eligible" employee, i.e., a veteran, Danko had the option of challenging the removal either through the grievance and arbitration process or by appeal to the Merit Systems Protection Board (MSPB). *See* 39 U.S.C. § 1005(a)(2); 5 U.S.C. § 2108. The notice of removal indicated that Danko's status during the pendency of any appeal from the discharge would be that of an employee "on the rolls, but in a nonpay, nonduty status," as specified in article 16.5 of the collective bargaining agreement. Article 16.5 states in pertinent part that, following a 30-day notice period, an employee discharged for cause "shall remain on the rolls (non-pay status) until disposition of the case." Article 16.1 confirms that an employee may be discharged for "just cause," and that an employee who succeeds in overturning a discharge is eligible for "reinstatement and restitution, including back pay."

In anticipation of Danko's forthcoming discharge, the Local pursued three courses of action. On June 29, 1984, it filed an unfair labor practice charge, which Danko signed, with the National Labor Relations Board; on July 3, 1984, the union filed a grievance on Danko's behalf in accordance with the terms of the collective bargaining agreement; and, on July 23, 1984, after the matter had proceeded through two of the four steps of the grievance and arbitration process, appellees filed the complaint in the instant action seeking declaratory and injunctive relief. Appellees claimed that Danko's proposed dismissal for engaging in union-related activities was without just cause, and that his being placed on nonpay status pending arbitration would cause him and his family irreparable harm. Appellees also alleged that Danko's threatened discharge for contacting Mystic would have a "chilling effect upon the activism of postal workers throughout the State of Connecticut." The Postal Service moved to dismiss the action for lack of jurisdiction and failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b) (6). On July 24, 1984, appellees moved, by order to show cause, for a preliminary injunction staying Danko's discharge pending the outcome of the grievance and arbitration procedure.

The district court, by order dated August 14, 1984, granted appellees' motion for a preliminary injunction and denied the Postal Service's motion to dismiss the action for lack of jurisdiction and failure to state a claim upon which relief could be granted. 595 F. Supp. 403. While acknowledging that the "collective bargaining agreement requires arbitration of this dispute," the district court held that it was not preempted from awarding injunctive

relief during the pendency of the arbitration process. Rather, the district court held that it had jurisdiction to issue a preliminary injunction on the grounds that the injunction was being sought in aid of arbitration.

On the merits, the district court found that the potentially chilling effect on the first amendment rights of appellees constituted irreparable harm, sufficient to justify injunctive relief. In addition, the district court found that appellees had demonstrated a likelihood of success on the merits and also that the balance of equities was in their favor.

In issuing the injunction, the district court stated that "the Postal Service does not contend that Danko's continued presence in the New London office will result in the disruption of the office or the destruction of working relationships." Disagreeing with this, and again challenging the district court's jurisdiction to issue the injunction, appellant moved for reconsideration. The motion was accompanied by the declaration of F. Boughan, District Director of Employee and Labor Relations. Boughan stated that not following the rule agreed to in the collective bargaining agreement to place employees discharged for just cause in nonpay and nonduty status would be "disruptive to Postal operations" and would serve as "a constant reminder to the remaining employees that management does not have the authority to discipline its employees with court approval."

The district court denied appellant's motion for reconsideration. In doing so, the court stated: "The merits [of the dispute] are for the arbitrator, in the first instance, to decide. I have concluded only that plaintiffs' claims of irreparable injury are sufficiently strong to require an injunction pending a merits decision."

On appeal, the Postal Service reasserts its claim that the district court lacked jurisdiction to issue the preliminary injunction, that the injunction was not in aid of arbitration, and also that appellees have failed to satisfy the traditional prerequisites for the issuance of injunctive relief, in particular that appellees have failed to demonstrate the existence of irreparable harm.

Discussion

Jurisdiction

The Postal Service contends that the issuance of an injunction was contrary to "established principles of labor law" and that the district court was "preempted" from issuing the injunction. Brief for the United States Postal Service at 17. According to appellees, this argument by the Postal Service constitutes a challenge to the jurisdiction of the district court. Brief for Plaintiffs-Appellees at 9.

Section 1208(b) of the Postal Reorganization Act gives district courts having personal jurisdiction over the parties subject matter jurisdiction over

> [s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees . . . .

39 U.S.C. § 1208(b). We therefore hold that the district court had jurisdiction over the instant case.

Moreover, there is no statutory bar to the issuance of an injunction herein since this case is not goverened by the Norris-LaGuardia Act, 29 U.S.C. § 104. The Norris-LaGuardia Act specifically states that "[n]o court . . . shall have jurisdiction" to issue certain types of injunctions "involving or growing out of any labor dispute."

Id. However, even where the injunction ordered is subject to the Norris-LaGuardia Act, the Supreme Court has approved the exercise of jurisdiction where necessary to preserve the arbitration process. *See Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 254 (1970). Given that the Supreme Court has allowed courts to consider the propriety of issuing an injunction in cases subject to the Norris-LaGuardia Act, where the exercise of jurisdiction *is* specifically prohibited by statute, *id.*, we hold that the district court in this case, where there is *no* statutory prohibition, had jurisdiction to determine whether an injunction was warranted herein.

Finally, with regard to jurisdiction, neither the pendency of Danko's unfair labor practice charge before the NLRB (upon which the Board has indicated it will not act until the arbitrator renders a decision), nor the statutory review procedures for challenges to adverse employment action established under the Civil Service Reform Act, 5 U.S.C. § 7701 *et seq.*, deprived the district court of jurisdiction. With regard to the NLRB action, appellees have not litigated the unfair labor practice claim before the district court. In addition, applying the body of law developed under 29 U.S.C. § 185, the analogue to 39 U.S.C. § 1208(b), *see National Association of Letter Carriers, AFL-CIO* v. *Sombrotto*, 449 F.2d 915, 918-19 (2d Cir. 1971), the district court and NLRB have concurrent jurisdiction over suits to enforce labor contracts, even if the conduct involved might entail an unfair labor practice. *See Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 561-63 (1976). With regard to the statutory review procedures, as a "preference eligible" employee, Danko had the option of challenging his discharge through

either the contractual arbitration process or the Civil Service's review procedures. His choice of the contractual alternative barred his invocation of the statutory procedures. 5 U.S.C. § 7121(e)(1).

Propriety of the Injunction

Having determined that the district court had jurisdiction to issue preliminary injunctive relief, we conclude that the district court nevertheless abused its discretion in awarding an injunction under the facts and circumstances of this case. *Brown* v. *Chote*, 411 U.S. 452, 457 (1973).

To obtain a preliminary injunction, a party must show: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc.* v. *H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

With regard to the existence of irreparable harm, in *Sampson* v. *Murray*, 415 U.S. 61, 91-92 (1974), the Supreme Court articulated a particularly stringent standard for irreparable injury in government personnel cases. Therein, a probationary government employee sought an injunction against her discharge pending administrative review, alleging that the deprivation of income for an indefinite period of time constituted irreparable injury. According to the *Sampson* Court, except in a "genuinely extraordinary situation," irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment. *Id.*

at 92 n.68. We therefore agree with the district court that Danko's financial difficulties resulting from his discharge are not sufficient to establish irreparable injury.

Appelles contend and the district court found, however, that Danko's discharge pending arbitration would have a chilling effect on the exercise of their first amendment rights and that such a chilling effect constitutes irreparable injury. Appellant admits that the chilling of first amendment rights would constitute irreparable injury. *Katz* v. *McAulay*, 438 F.2d 1058, 1060, n.3 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). Appellant argues, however, that appellees have failed to demonstrate that Danko's discharge, pending arbitration, would in fact have a chilling effect on appellees' first amendment rights.

We conceive the question facing us concerning the existence of irreparable harm in the instant case as being twofold: whether appellees' first amendment rights are implicated by Danko's letter to Mystic; and, if so, whether Danko's discharge pending arbitration sufficiently chills the exercise of those rights to justify preliminary injunctive relief. As to whether the letter to Mystic implicates appellees' first amendment rights, in *Connick* v. *Meyers*, 461 U.S. 138 (1983), the Supreme Court, citing *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), held that although a government employee does not relinquish first amendments rights merely upon assumption of such employment, in order for a public employee's speech to be protected by the first amendment, it must involve a matter of public interest or concern. 461 U.S. at 142-47; *see Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 284 (1977).

In deciding whether an issue is one of public concern, the *Connick* Court stated that such a determination should be based on "the content, form, and context of a given statement, as revealed by the whole record." *Connick* v. *Meyers*, 461 U.S. at 147-48.

Herein, Danko's letter to Mystic seems to have been, at least in part, about a matter of public concern. Although the letter referred to excessing as the cause of delays in the mail, the purpose of the letter, as stated in its opening sentence, was to inform Mystic of the delay. Given the Postal Reorganization Act's reference to the need of the public to receive "prompt, reliable and efficient service," 39 U.S.C. § 101, the press coverage of the postal delays, and the letters sent by Danko to his government representatives, it seems reasonable for the district court to have concluded that the letter to Mystic was, at least in part, about a matter of public concern.

We hold, however, that even if appellees' first amendment rights are implicated herein by Danko's letter to Mystic, appellees have not demonstrated that Danko's discharge, pending the outcome of the grievance and arbitration process, would have a chilling effect on appellees' exercise of their first amendment rights, sufficient to constitute irreparable harm. As the Supreme Court stated in *Laird* v. *Tatum*, 408 U.S. 1 (1972), a party must articulate a "specific present objective harm or a threat of specific future hard" to establish a cognizable claim based on the chilling of first amendment rights. *Id.* at 13-14; *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 56-57 (1974).

In our view, appellees herein have failed to allege a clearcut infringement of first amendment rights which, absent preliminary injunctive relief, either has occurred

or will occur in the future. Rather, appellees merely make the conclusory assertion that Danko's discharge has "chilled the will of the postal workers in Connecticut, and their elected officials." More importantly, as appellant argues, we fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction.

Moreover, appellees incorrectly rely on *Elrod* v. *Burns*, 427 U.S. 347 (1976) to support their position. In *Elrod*, at the time a preliminary injunction was sought in the district court, employees of the Sheriff's Office of Cook County, Illinois, were being threatened with immediate discharge for refusing to change their political affiliations. The *Elrod* Court noted that "[i]t [was] clear . . . that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id. at* 373. Herein, to the contrary, we do not find that appellees' first amendment right to speak truthfully about matters of public concern was threatened by Danko's discharge, pending arbitration, for making allegedly false statements to a customer. For the foregoing reasons, we hold that appellees have failed to demonstrate sufficient injury to justify a finding of irreparable harm.

Furthermore, since this case involves the issuance of a preliminary injunction restraining an employer from conduct subject to arbitration, in addition to the traditional requirements for a preliminary injunction, appellees must also show that the injunction was necessary to preserve the jurisdiction of the arbitrator or as an aid to

arbitration. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 534 (1960) (injunction may issue to restrain employer from conduct subject to arbitration in order to "preserve [the arbitrator's] jurisdiction by preventing injury so irreparable that a decision of the [arbitrator] in the unions' favor would be but an empty victory.") For example, in *Lever Brothers Company* v. *International Chemical Workers Union, Local 217*, 554 F.2d 115 (4th Cir. 1976), the arbitrable issue was whether the company had the right to relocate its plant. Pending the outcome of the arbitration, the court enjoined the company from making the move. Had the injunction not been issued, the company would have relocated and the employees "*would have been totally and permanently deprived of their employment.*" *Id.* at 122 (emphasis in original). According to the court, this would have rendered the arbitrator's award to the union "but an empty victory." *Id.* (quoting *Brotherhood of Locomotive Engineers*, 363 U.S. at 535); *see Local Lodge No. 1266, IAMAW* v. *Panoramic Corp.*, 668 F.2d 276, 279-83 (7th Cir. 1981) (injunction required to avoid "depriv-[ing] the union of an effective remedy in the event the arbitrator decided the grievance in the union's favor" (citing *Lever Brothers Company*)); *Columbia Local, APWU* v. *Bolger*, 621 F.2d 615, 617-18 (4th Cir. 1980) (injunction may issue where "the arbitrator could not . . . satisfactorily return the parties to the *status quo ante* if this were required by the arbitration result") (emphasis in original).

Applying these principles herein, we can find no basis to conclude that an injunction is required in order to aid the arbitral process. The dispute is currently the subject

of arbitration, and if Danko's discharge is ultimately deemed to have been without cause, he can be reinstated with full pay, thereby returning him to his formal status with nc difficulty. Moreover, to require the Postal Service to keep Danko on the job during the interim period would frustrate that provision of the collective bargaining agreement that specifically authorizes placing an employee on nonpay status pending the outcome of a grievance and arbitration proceeding.

Given the absence of irreparable harm, which constitutes an absolute requirement for an award of injunctive relief, *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976), and given that, in our view, the injunction was not an aid to arbitration, we find it unnecessary to consider appellees' arguments concerning the other prerequisites for the issuance of preliminary injunctive relief.

For the foregoing reasons, we reverse the decision of the district court.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of September one thousand nine hundred and eighty-five.

No. 84-6329

AMERICAN POSTAL WORKERS UNION, AFL-CIO, NEW LONDON CONNECTICUT AREA LOCAL, CONNECTICUT STATE POSTAL WORKERS UNION, APWU, AFL-CIO, and PHILIP N. DANKO,

Plaintiffs-Appellees,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, American Postal Workers Union, AFL-CIO, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

by Gayle N. McDowell
Deputy Clerk

FILED
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
September 10, 1985
ELAINE B. GOLDSMITH,
CLERK

Opinion and Order of the District Court on the Motion for a Preliminary Injunction

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL NO. H-84-809

AMERICAN POSTAL WORKERS UNION, ET AL.

v.

UNITED STATES POSTAL SERVICE

RULING ON MOTION FOR A PRELIMINARY INJUNCTION

The plaintiffs seek a preliminary injunction restraining the Postal Service from terminating the employment of Philip N. Danko, pending arbitration of the dispute. The defendant opposes the motion and has moved to dismiss for failure to state a claim. The plaintiffs' motion was heard on August 8, 1984, but no evidence was taken because the defendant conceded that the facts as stated in the plaintiffs' complaint were true.

Facts

This dispute began with the decision of the Postal Service to "excess" (*i.e.*, eliminate) fourteen positions at the

New London Post Office and transfer a number of those employees to other offices in Connecticut. Danko, who is President of the union local, opposed this action; in particular, he claimed that the loss of these positions caused delayed mail service for customers of the New London Post Office. Danko publicized his opposition by contacting the local newspapers, the Senators from Connecticut, and his local Congressman.

The dispute was brought to a head by a letter that Danko sent to Mystic Color Lab, the largest customer of the New London Post Office. Danko informed Mystic Color Lab that, as a result of the elimination of the fourteen positions, its mail was being delayed. The defendant concluded that this letter constituted conduct prejudicial to the interest of the Postal Service and decided to discharge Danko.

The firing was to have taken effect on July 26, 1984, but Judge Clarie issued a temporary restraining order precluding the firing on July 24, 1984, which I extended for an additional ten days on August 3, 1984. The plaintiffs, Danko and the union representing employees at the New London Post Office, seek a preliminary injunction restraining the discharge until the arbitration of the dispute is completed.

The collective bargaining agreement requires arbitration of this dispute and the parties have commenced the arbitration process.[1] The collective bargaining agreement establishes four steps in the arbitration process, two of which have been completed.

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1. The plaintiffs have also filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"), which has decided to defer action pending arbitration. *See Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

Discussion

The plaintiffs have presented several arguments in support of their contention that Danko should not have been fired by the Postal Service. The defendant disputes the merits of all of the plaintiff's arguments and contends that a preliminary injunction should not issue because the plaintiffs have not established any irreparable harm. The defendant also challenges the court's jurisdiction because primary jurisdiction lies with the NLRB.

To obtain a preliminary injunction, the plaintiff must show:

> (a) irreparable harm and (b) either (1) the likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the [plaintiff].

Jackson Dairy, Inc. v. *H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). Danko's financial difficulties resulting from his discharge are not sufficient to establish irreparable injury. *See Sampson* v. *Murray*, 415 U.S. 61 (1974). But the plaintiffs contend that Danko's discharge will have a chilling effect on his and the other employees' exercise of their first amendment rights. The union contends that the chilling effect on its members' first amendment rights is an irreparable injury. To determine whether there will be a chilling effect one must first inquire whether Danko's actions were protected by the first amendment.

First Amendment

The Postal Service contends that Danko's letter did not address a matter of public concern and thus was not pro-

tected speech under the first amendment.[2] From the other side, the plaintiffs contend that Danko's letter did not address a matter of purely private concern; they contend that the public has a vital interest in the efficient operation of the mails.

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

Connick, 103 S. Ct. at 1690 (footnote omitted).

In *Connick*, an assistant district attorney distributed to other employees a questionnaire criticizing the internal workings of the district attorney's office, which was held not to be a matter of public concern. *But see Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977) (speech about a dress code for teachers was a matter of public concern because it affected public support for bond issues). However, one of the questions on the questionnaire did address a matter of public concern: whether public employees were pressured into participating in political campaigns.[3] *Connick*, 103 S. Ct. at 1691. Sim-

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2. Such speech does not fall in the same category as obscenity which is never protected under the first amendment; rather, if the speaker is a public employee, he may be fired for such speech without violating the first amendment. *Connick* v. *Myers*, 103 S. Ct. 1684, 1690 (1983).

3. In *Connick*, the Court balanced the extent to which the plaintiff's first amendment rights were infringed against the government's interest in promoting the efficiency of public services:

> The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.

Id. at 1694. In this case, the Postal Service does not contend that Danko's continued presence in the New London Post Office will result in the disruption of the office or the destruction of working relationships. Furthermore, the fact that Danko's speech did not occur at the workplace decreases the likelihood that his continued employment would have an adverse effect on the operation of the Post Office. *Cf. Connick*, 103 S. Ct. at 1693 n.13.

ilarly, in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), the Court held that a schoolteacher's complaints about the allocation of funds between academic and athletic programs were addressed to a matter of public concern.

In this case, Danko's letter was about a matter of public concern as well as a purely private dispute. The letter was designed to aid the union in its efforts to convince the Postal Service to reinstate the jobs which had been terminated at the New London Post Office. This dispute over the jobs is a private dispute between the union and the Postal Service, but the effects of this dispute were not a purely private matter. It should be noted that Danko's letter was but one part of a campaign to inform the public of delays in mail deliveries at the New London Post Office. This campaign had received some attention in the local newspapers, which is some evidence that the matter is of public concern.[4] The public has a legitimate and pressing interest in the prompt delivery of the mails. Thus, to the extent that the lost jobs caused a delay of the mails, the private dispute was a matter of public concern.

Irreparable Harm

The loss of first amendment rights for even a short period of time is an irreparable injury. *Elrod* v. *Burns*, 427 U.S. 347 (1976). Furthermore, "a plausible claim of a 'chilling effect' on the exercise of [first amendment rights] meets the irreparable harm requirement." *Maceira* v. *Pagano*, 649 F.2d 8, 18 (1st Cir. 1981); *see also Katz* v.

4. Although the person to whom speech is directed is not dispositive, it is a factor to be considered. *Compare Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) (speech protected by the first amendment although directed only to the employer) with *Mount Healthy* (fact that communication was broadcast by a radio station was evidence that it was a matter of public concern).

McAulay, 438 F.2d 1058, 1060 n.3 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 926 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). I conclude that the plaintiffs have shown that the failure to enjoin Danko's discharge would result in a chilling of his and the other employees' exercise of their first amendment rights; thus the plaintiffs have satisfied the irreparable harm requirement.

Success on the Merits

The defendant contends that Danko committed an act of disloyalty and thus his discharge was justified. The plaintiffs argue that the discharge was unlawful because Danko was discharged for exercising his first amendment rights. Although the defendant might argue that it would have discharged Danko even in the absence of the protected conduct, *see Mount Healthy*, 429 U.S. at 281-87, the only instance of disloyalty which the defendant has presented is the letter to Mystic Color Lab. Thus, this case is distinguishable from *Mount Healthy* in which the defendant claimed that the plaintiff had engaged in conduct justifying his discharge completely apart from the conduct which was protected by the first amendment. *Id.* at 281-82. In light of my conclusion, at this stage of the proceedings,[5] that Danko's letter addressed a matter of public concern, the defendant's admission that Danko was discharged for writ-

5. If the trial on the merits were to be held in this court, I would not be bound by the conclusions of law or fact reached in this decision. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953). Similarly, the arbitrator of this dispute will not be bound by my conclusions. *Cf. Teamsters Local 71 v. Akers Motor Lines, Inc.*, 582 F.2d 1336, 1341-42 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

ing that letter[6] is a sufficient basis to find that the plaintiffs have shown a likelihood of success on their claim that Danko's discharge was unlawful.[7]

Jurisdiction

The defendant has moved to dismiss this suit because primary jurisdiction lies with the NLRB and therefore this court does not have jurisdiction to issue an injunction. In *Boys Markets, Inc.* v. *Retail Clerk's Union*, 398 U.S. 235 (1970), the Supreme Court held that a union may be enjoined from striking over a grievance which the collective bargaining agreement consigned to arbitration. Otherwise, the union could frustrate the arbitration process by using a strike to wring concessions from an employer before the arbitrator could decide the issue. The availability of injunctions has been narrowed in *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976), but an injunction may be issued in aid of arbitration. *See Columbia Local, American Postal Workers Union* v. *Bolger*, 621 F.2d 615 (4th Cir. 1980); *United Steelworkers* v. *Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979). In addition to the traditional requirements for the issuance of a preliminary injunction, the failure to issue an injunction must "deprive the union of an effective remedy in the event the arbitrator

6. While the defendant has not explicitly equated the first amendment activity of the plaintiff with the contention that the plaintiff was guilty of disloyalty, at this point in the proceedings, the defendant has offered no other logical basis for its contention.

7. Although the plaintiffs need not show a balancing of the hardships tipping decidedly in their favor, the defendant will not suffer an irreparable injury from Danko's continued employment. Where, as here, the defendant will suffer no irreparable harm if the motion is granted and the plaintiff will suffer irreparable harm if the motion is denied, the balance of the hardships tips decidedly in favor of the plaintiffs. *Cf. Hamilton Watch Co.*, 206 F.2d at 743; *Dino DeLaurentiis Cinematografica* v. *D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966).

decided the grievance in the union's favor." *Local Lodge No. 1266* v. *Panoramic Corp.*, 668 F.2d 276, 283 (7th Cir. 1981); *Lever Bros. Co.* v. *Int'l. Chemical Workers*, 554 F.2d 115 (4th Cir. 1976).

The inquiry into whether the arbitration would be frustrated by the failure to issue an injunction is closely related to the question of whether the plaintiffs will suffer an irreparable injury. *See Panoramic*, 668 F.2d at 286. The arbitrator would be able to remedy Danko's loss of employment by ordering reinstatement and back pay, but the failure to issue an injunction would frustrate the arbitration process because the arbitrator would be unable to remedy the chilling effect on the employees' exercise of their first amendment rights.

For the foregoing reasons, the defendant's motion to dismiss is denied, and the plaintiffs' motion for a preliminary injunction is granted.

So Ordered.

Dated at Hartford, Connecticut, this 14th day of August, 1984.

/s/ M. Joseph Blumenfeld

M. Joseph Blumenfeld
Senior United States District Judge

Preliminary Injunction

UNITED STATES DISTRICT COURT

District of Connecticut

CIVIL NO. H-84-809

American Postal Workers Union, et al.

v.

United States Postal Service

PRELIMINARY INJUNCTION

The court having considered the verified complaint, the affidavits in support of the motion for a preliminary injunction and in opposition thereto, for the reasons stated in the Ruling on Motion for a Preliminary Injunction, it is

Ordered, that the defendant, its agents, servants, employees and attorneys and all persons in active concert and participation with it be and hereby are restrained and enjoined, pending arbitration of this dispute, from discharging Philip N. Danko for conduct occurring prior to the date of this order; provided that the bond required by the Temporary Restraining Order dated July 24, 1984, be continued to secure the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined.

Dated at Hartford, Connecticut, this 13th day of August, 1984.

/s/ M. Joseph Blumenfeld

M. Joseph Blumenfeld
Senior United States District Judge

Opinion and Order of the District Court on the Motion for Reconsideration

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL NO. H-84-809

AMERICAN POSTAL WORKERS UNION, ET AL.

v.

UNITED STATES POSTAL SERVICE

RULING ON MOTION FOR RECONSIDERATION OR STAY

Defendant in this action has moved for reconsideration or stay of my previous decision to grant a preliminary injunction restraining the discharge of plaintiff Philip Danko pending arbitration of a labor dispute. *American Postal Workers Union* v. *United States Postal Service*, Civil No. H-84-809 (August 14, 1984) (Blumenfeld, J.). The facts are set forth adequately in that decision, and I need not restate them here. In a lengthy, repetitive, and somewhat disorganized brief, defendant advances various arguments to the effect that this court was without jurisdiction to issue an injunction in this case. These arguments are addressed below.

I. *Statutory Basis for Jurisdiction*

As an initial matter, 39 U.S.C. § 1208(b)[1] appears to vest jurisdiction in this court. Defendant argues, however, that the body of case law applicable to section 1208(b) precludes the exercise of jurisdiction. The parties agree that the law developed under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, applies by analogy. *See National Ass'n of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 918-19 (2d Cir. 1971). It is equally well established that in resolving issues under section 301, a district court may apply the case law developed under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

II. *Exhaustion of Contractual Remedies*

Defendant contends that the plaintiffs may not seek relief in federal court until they have complied with contractual arbitration procedures to the final step. In effect, defendant's position is that while a court may enforce an arbitration award, a court has no power to maintain the status quo pending the results of arbitration. However, neither the case law nor the Congressionally-established policy favoring arbitration as the means of resolving labor disputes requires this result.

Republic Steel Corp. v. *Maddox*, 379 U.S. 650 (1965), cited by defendant in support of its contention, is inapposite. In *Republic*, a discharged employee who had made

1. The statute provides:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

no effort to utilize contractual grievance/arbitration procedures brought suit in state court to recover severance pay which he alleged was owed him under the terms of the contract. On appeal from a state court judgment in favor of the employee, the Supreme Court held that federal policy prohibits an individual from electing "to completely sidestep available grievance procedures in favor of a lawsuit." *Id.* at 653.

In contrast to the situation in *Republic Steel*, the plaintiff in the instant case is actively pursuing contractual remedies. But in a classic plea for equitable relief, he alleges that he will suffer irreparable injury if the status quo is not maintained during the possibly lengthy grievance/arbitration process. Such an action has repeatedly been held to be within the jurisdiction of the district court. *E.g., Local 553, Transport Workers Union* v. *Eastern Air Lines*, 695 F.2d 668 (2d Cir. 1982); *Columbia Local, American Postal Workers Union* v. *Bolger*, 621 F.2d 615 (4th Cir. 1980); *Lever Brothers Co.* v. *International Chemical Workers Union Local 217*, 554 F.2d 115 (4th Cir. 1976); *Hoh* v. *Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974); *Teamsters Local Union No. 764* v. *Branch Motor Exp. Co.*, 463 F. Supp. 282 (D. Pa. 1978).

Buffalo Forge Co. v. *United Steelworkers*, 428 U.S. 397 (1976), is not to the contrary. In *Buffalo Forge*, the Supreme Court held that section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, prohibits an injunction against a sympathy strike which both employer and union agreed was itself over a *non-arbitrable* issue. 428 U.S. at 407-08. The Court went on to say that although the parties in *Buffalo Forge could* arbitrate the issue of whether the sympathy strike violated the contract's express no-strike clause, an injunction against the strike would violate sec-

tion 4(a) of the Norris-LaGuardia Act's express prohibition against injunctions prohibiting any person from "[c]easing or refusing to perform any work or to remain in any relation of employment." Behind this holding lay the Congressional policy decision that courts should not predetermine factual and contract interpretation issues which the parties have agreed to place in the province of the arbitrator, as well as the Court's recognition that "[i]njunctions against strikes, even temporary injunctions, very often permanently settle the issue." 428 U.S. at 412.

Buffalo Forge does not control the instant case. There is no strike here. The dispute is over an arbitrable issue. The preliminary injunction does not settle the dispute, nor does it predetermine either factual issues or the interpretation of the contract. The Norris-LaGuardia Act does not by its policy or its terms forbid an injunction, and an injunction here furthers, rather than derogates, federal policy in favor of arbitration as a means of resolving labor disputes. *Cf. Boys Markets, supra*, 398 U.S. at 249-53. The injunction merely preserves the present relationship between the parties in recognition of the fact that, should plaintiff Danko prevail in the grievance/arbitration process, the arbitrator's award of reinstatement and back pay could not remedy the damage done to plaintiffs by chilling the exercise of their first amendment rights. *See Elrod* v. *Burns*, 427 U.S. 347 (1976); *Sheehan* v. *Purolator Courier*, 676 F.2d 877, 885 (2d Cir. 1981).

III. *Preemption*

Defendant next contends that this court is without jurisdiction to issue an injunction in this case because the question whether the Postal Service violated Danko's rights

under sections 7 and 8 of the NLRA is within the exclusive jurisdiction of the NLRB. The argument is a curious one, since plaintiffs have not sought to litigate Danko's section 7 and 8 rights in this forum. In addition to this action, plaintiffs have filed an unfair labor practice charge with the NLRB, upon which the Board has indicated no action will be taken until the arbitrator has rendered a decision. Plaintiffs do not ask this court to interfere with the NLRB's jurisdiction by determining the merits of the unfair labor practice charge, but rather to preserve the status quo pending the arbitrator's decision. The law does not preclude the court from doing so.

In *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964), the Supreme Court held that the existence of an unfair labor practice remedy before the Board did not bar a union from seeking a court order compelling arbitration. *See also Smith* v. *Evening News Association*, 371 U.S. 195 (1962) (suit for damages not barred by existence of NLRB remedy). At least since then, it has been beyond dispute that the NLRB and the District Court have concurrent jurisdiction over suits to enforce labor contracts, even where the conduct involved might well be an unfair labor practice. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 562 (1976); *Pari Mutuel Clerks Union of La.* v. *Fair Grounds Corp.*, 703 F.2d 913, 917-18 (5th Cir. 1983).

Defendant suggests, citing *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978) and *NLRB* v. *International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953), that the NLRB would not find an unfair labor practice on the facts of this case.[2] That argument does not go to this court's jurisdic-

2. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), also relied on by defendant, holds only that speech protected under federal labor laws cannot be the subject of a state court libel judgment.

tion to issue an injunction pending arbitration, but rather to the merits of the dispute between the parties. The merits are for the arbitrator, in the first instance, to decide. I have concluded only that plaintiffs' claims of irreparable injury to their first amendment rights are sufficiently strong to require an injunction pending a merits decision.

It is not, however, the *jurisdiction* of the court which is premised on the constitutional claim. While in the absence of such a claim a court might properly choose, as a *discretionary* matter, to refrain from issuing an injunction, jurisdiction here is based on statute. The constitutional claim goes to the existence of irreparable injury, a prerequisite for equitable relief.

In sum, I conclude that I am not required by law to defer to the NLRB in this matter. The court shares jurisdiction with the Board. In light of the Board's decision to defer to the arbitrator, and in the circumstances of this case, it was no invasion of the Board's authority to issue the injunction in this case.

IV. *The Statutory Remedial Scheme*

In a final assault on the jurisdiction of the court, defendant argues that under *Carlson* v. *Green*, 446 U.S. 14 (1980), and *Bush* v. *Lucas*, —— U.S. ——, 51 U.S.L.W. 4752 (June 13, 1983), the existence of a statutory remedial scheme precludes the implication of a remedy under the Constitution. These cases are not on point, because this is not a *Bivens* action. Plaintiffs here seek the intervention of this court not to award damages for a constitutional violation, nor to bypass the avenues of relief established by Congress and the collective bargaining agreement. Rather, they seek temporary injunctive relief to preserve their constitutional

rights while they pursue remedies under the very statutory and contractual scheme invoked by defendant. In these circumstances, the discussion of implied constitutional damage remedies is wide of the mark.

The legal issue in *Bush* v. *Lucas* was quite different from the issue in the case at bar. Bush, an employee of the National Aeronautics and Space Administration's Marshall Space Flight Center, was demoted for making public comments critical of the Center. Through the Civil Service appeals process, he sought and was eventually awarded both reinstatement and back pay. Simultaneously, he filed an action seeking to recover damages for alleged violation of his first amendment rights. The issue presented to the Supreme Court was whether, in light of the elaborate remedial system provided by Congress, the Court should imply a non-statutory *damages remedy* against the supervisor who demoted Mr. Bush. The Court held in the negative, emphasizing that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the Civil Service." 51 U.S.L.W. at 4758.

In the instant case, however, plaintiff does not seek an implied damages remedy. Congress has already provided a statutory basis for the jurisdiction of the court and no "new species of litigation" is contemplated. Moreover, plaintiff occupies a position of some importance—*i.e.*, President of his union local—in the system of collective bargaining which Congress has sought through the labor laws to encourage and protect, and plaintiff alleges not only a violation of his own first amendment rights, but also a chilling effect on the rights of the members of his local.

See Sheehan v. *Purolator Courier, supra.*[3] Nothing in *Bush* v. *Lucas* addresses this situation or requires a court to forbear from exercising its traditional power to fashion an equitable remedy.

V. *Additional Issues*

Defendant raises several additional arguments, going to issues other than the jurisdiction of the court.

First, defendant continues to insist that under *Connick* v. *Myers*, 51 U.S.L.W. 4436 (April 20, 1983), Danko's speech was not protected by the first amendment. In my previous decision in this matter, I made plain my view that under these circumstances, the letter which Danko was fired for signing addressed a matter of sufficiently public concern to bring Danko under the amendment's protection. In *Connick*, the Court stated that its holding was a limited one:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstanes, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

51 U.S.L.W. at 4438. In my view, both the content of Danko's statements and the circumstances under which

3. *Cf. Holt* v. *Continental Group, Inc.*, 708 F.2d 87 (2d Cir. 1983) (In Title VII case, court in determining whether irreparable injury requirement for preliminary injunction has been met should consider risk that other employees may be chilled in the exercise of their rights by permitting plaintiff's discharge pending the outcome of state administrative proceedings.)

they were made take them outside the scope of the holding in *Connick*.[4]

Second, defendant argues that plaintiffs have failed to demonstrate irreparable injury, since if Danko should prevail in arbitration he will receive reinstatement and back pay. However, it is clear that such an award will not remedy the damage done to the first amendment rights of Danko and the members of his union local. This is the type of case to which the court in *Lever Brothers* referred when it stated that an injunction could issue "where it is

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4. The *Connick* decision is discussed in *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611 (1984), where the authors state:

> The public has a substantial interest in the robust and informed discussion of governmental affairs. *Pickering* [v. *Board of Education*, 391 U.S. 563 (1968)] recognized that public employees, by virtue of their expertise and experience, are often among the citizens who are best informed about the workings of government and that their opinions are thus especially valuable to the public. Although the Court in *Connick* found that *Pickering*'s protection extends only to employee speech regarding "matters of public concern," courts should be wary of deciding that informed discussion of government's internal operations is of no concern to the public.
>
> In particular, courts should not automatically regard labor grievances over office policy to be purely personal matters. Grievances relating to compensation levels and the problems of discipline and morale within public agencies trigger public concern when they threaten the competency or efficiency of public servants. In *Connick*, the Court held that an employee who distributed a questionnaire relating to office morale and practices had expressed a personal concern; yet the Court stressed that its holding rested on the particular facts at issue. *Connick* did not hold that speech relating to labor grievances is always a personal matter; indeed, such a holding would depart from the Court's commitment to case-by-case balancing. Rather, the Court held only that the plaintiff's *particular* grievances were personal. In the short time since *Connick* was decided, two lower federal courts have found, based on the particular facts before them, that speech relating to labor grievances addressed matters of public concern.

Id. at 1768-69 (footnotes omitted).

necessary to prevent conduct by the party enjoined from rendering the arbitral process a hollow formality . . . [since] . . . the arbitral award when rendered could not return the parties substantially to the status quo ante." 554 F.2d at 123. The Supreme Court has held, moreover, that harm to first amendment rights satisfies the irreparable injury requirement for equitable relief. *Elrod* v. *Burns*, 427 U.S. 347 (1976) (opinion of Brennan, J.).

Defendant also contends that the local union has no standing to sue, and impliedly argues that this court abused its discretion when it considered the harm that would be done to members of the local if Danko's discharge were allowed to stand pending arbitration.

It is clear, however, that the statute does not require a party to be a signatory to the contract in order to bring suit. *Santos* v. *Dist. Council of New York City*, 547 F.2d 197, 200 n.3 (2d Cir. 1977). *Cf. Columbia Local, supra.* Since the main requirement for standing under Article III is "injury in fact," *see Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), and there is no question that the union may assert its members' rights, *see NAACP* v. *Alabama*, 357 U.S. 449 (1958), I find the standing contention to be without merit.

Finally, defendant contends that the court has improperly balanced the hardships in this case, since the public interest will suffer if defendant must retain this miscreant on its payroll. But defendant has never alleged that plaintiff Danko performs his work in less than adequate fashion. However, defendant now alleges, by affidavit of Francis Boughan, Director of Employee and Labor Relations for the Connecticut Valley District of the United States Postal Service, that the injunction is harmful to United States

Postal Service efficiency, because it undermines management authority to discipline employees for cause.

The existence of "cause" for Danko's discharge is of course an issue to be adjudicated before the arbitrator. Should he or she determine that cause existed, Danko will be discharged, and management authority will be vindicated. The issue, then, is whether the public interest suffers from the fact that Danko must be maintained in work status until a decision is rendered. This question is complicated by the presence of the first amendment issues in the case. I find that the loss of face which management may incur, not from Danko's speech itself but simply from the inability to discharge him pending resolution of his grievance, is insufficient to outweigh the damage which would be done to plaintiffs' first amendment rights if Danko were discharged pending arbitration, even if the discharge were subsequently reversed.

Conclusion

I reiterate what I said in my previous decision in this matter: "If the trial on the merits were held in this court, I would not be bound by the conclusion of law or fact reached in this decision." The purpose of this injunction is not to prejudge the case or to influence the arbitrator. It is merely to preserve the status quo until the arbitrator decides the issues raised by Danko's grievance. Should the matter come before me once again after that event, different considerations might apply to a determination of the merits. At this stage, however, defendant has not convinced me either that issuance of the injunction was incorrect, or that a stay is warranted.

The decision granting a preliminary injunction having been reconsidered, for the reasons made clear above the decision is adhered to and a stay is denied.[5]

So Ordered.

Dated at Hartford, Connecticut, this 18th day of October, 1984.

/s/ M. Joseph Blumenfeld

M. Joseph Blumenfeld
Senior United States District Judge

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Clerk
U.S. District Court
District of Connecticut

5. It has come to my attention that on October 12, 1984, defendant filed a notice of appeal in this matter. Such notice does not, however, divest this court of jurisdiction to decide the instant motion. Although defendant styled its motion for reconsideration as a motion under Fed. R. Civ. P. 60, defendant specified no proper Rule 60 grounds for the motion. I have treated the motion as one made under Rule 59(e), and the notice of appeal is therefore a nullity under Fed. R. App. P. 4(a)(4). *See* 6A *Moore's Federal Practice* ¶ 59.12[1], p. 59-280 (1984).

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-990

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN POSTAL WORKERS UNION, AFL-CIO, NEW LONDON CONNECTICUT AREA LOCAL, ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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AMERICAN POSTAL WORKERS UNION, AFL-CIO,
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PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek to reinstate a preliminary injunction barring the Postal Service from placing an employee on non-pay status pending arbitration proceedings concerning the Postal Service's decision to discipline him, even though the employee has served the two-week suspension imposed by the Postal Service.

1. a. This dispute arose from a Postal Service decision to eliminate 14 positions at the New London, Connecticut, Post Office (Pet. App. 3a). Petitioners publicized their disagreement with this action by writing to elected officials and contacting local newspapers (*ibid.*), actions that are not the subject of any disciplinary action. Petitioners, however, also sent a letter, signed by petitioner Danko, the president of the local union, to one of the Postal Service's most

important local customers, Mystic Color Labs. The letter stated: "The purpose of this letter is to make you aware of the fact that large amounts of your film mailers are not being processed for outgoing dispatch or incoming delivery. This situation has been going on for some time now. Postal management will not make you aware of this, in fact they would most likely deny it if questioned about it." *Id.* at 3a-4a. The letter blamed the delays on the elimination of the 14 positions (*id.* at 4a). After an investigation, the Postal Service proposed to dismiss petitioner Danko on the ground that mailing this letter to a customer violated Danko's duty to avoid actions that adversely affect public confidence in the Postal Service (*ibid.*).

Petitioner Danko filed a grievance and requested arbitration pursuant to the Postal Workers' collective bargaining agreement (Pet. App. 6a). Under the collective bargaining agreement, invocation of the grievance procedures prevented the Postal Service from dismissing Danko, but placed him in nonpay, nonduty status pending resolution of his claims (*id.* at 5a).

b. On July 23, 1984, petitioners brought this suit in the United States District Court for the District of Connecticut, seeking a preliminary injunction barring the Postal Service from placing Danko on nonpay status pending the results of the arbitration process (Pet. App. 6a). The district court concluded, under *Sampson* v. *Murray*, 415 U.S. 61 (1974), that Danko's financial difficulties were not sufficient to establish the irreparable injury required to obtain an injunction (Pet. App. 20a). The court concluded, however, that Danko's letter concerned a matter of public concern and that it was therefore protected by the First Amendment (*id.* at 22a). Based on that conclusion, the court held that "the failure to enjoin Danko's discharge would result in a chilling of his and the other employees' exercise of their first amendment rights; thus the plaintiffs have satisfied the

irreparable harm requirement" (*id.* at 23a), and that "plaintiffs have shown a likelihood of success on their claim that Danko's discharge was unlawful" (*id.* at 24a). Finally, noting that injunctions should be issued pending arbitration only if the failure to issue an injunction would deprive the plaintiffs of an effective remedy if they prevailed at arbitration, the court concluded that "the failure to issue an injunction would frustrate the arbitration process because the arbitrator would be unable to remedy the chilling effect on the employees' exercise of their first amendment rights" (*id.* at 25a).

The court of appeals reversed (Pet. App. 1a-15a). While finding the letter to the Postal Service's customer "at least in part, about a matter of public concern," the court of appeals held that petitioners had failed to articulate a " 'specific present objective harm or a threat of specific future harm' " (*id.* at 12a, quoting *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972)). Rather, the court of appeals found, the plaintiffs "merely make the conclusory assertion that Danko's discharge has 'chilled the will of the postal workers in Connecticut, and their elected officials' " (Pet. App. 13a). Moreover, the court concluded, "we fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction" (*ibid.*). Finally, the court determined that, rather than aiding the arbitration process, the injunction requiring "the Postal Service to keep Danko on the job during the interim period would frustrate that provision of the collective bargaining agreement that specifically authorizes placing an employee on nonpay status pending the outcome of a grievance and arbitration proceeding" (*id.* at 15a).

c. After the court of appeals' decision, the Postal Service unilaterally reduced Danko's punishment to a two-week suspension (Pet. 9).[1] Petitioners did not seek a stay of the court of appeals' mandate pending their petition to this Court for further review, and the Postal Service has advised us that Danko's two-week suspension was served in November 1985. The arbitration hearing was concluded on January 22, 1986.

2. Further review is not warranted. Because petitioner Danko has served his suspension and the arbitration process has now substantially advanced, this controversy will almost certainly become moot before it could be adjudicated by this Court, if it is not already moot. In any event, the court of appeals' decision is based upon, and is fully consistent with, this Court's guidelines for protecting the First Amendment rights of public employees and, contrary to petitioners' claims, does not conflict with the decisions of any other court of appeals.

a. Since the Postal Service reduced petitioner Danko's punishment to a suspension, which he has already served, the issue before the lower courts—whether to issue a preliminary injunction barring the Postal Service from placing petitioner Danko on nonpay status pending arbitration—is no longer in controversy. It is not at all clear what relief petitioners seek at this point.[2] Furthermore, the arbitration

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[1]There is absolutely no support for petitioners' suggestion (Pet. 19) that the Postal Service's reduction of petitioner Danko's sanction was deliberately withheld until the court of appeals' decision.

[2]Petitioners argue (Pet. 15-16) that what matters "is whether the terminated employee is on the job and and thus able to pay his bills or off the job without such an ability while some tribunal wrestles with the legal niceties of the dispute." No injunction is now needed to put petitioner Danko "on the job" or prevent the Postal Service from removing him from his job.

Petitioners suggest without explanation (Pet. 19) that they are entitled to declaratory relief and that further court proceedings are

hearing has concluded. We are informed that, ordinarily, arbitration decisions are rendered within 60 days after the hearing is closed and that this dispute does not involve unusual circumstances likely to cause delay. After the arbitrator's decision, in the event petitioners remain aggrieved, the dispute would present substantially different legal questions. See, *e.g.*, *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596-599 (1960).

Petitioners argue that this case is not moot because there is " ' "a reasonable expectation that the *same complaining party* [will] be subjected to the same action again" ' " since they may write more letters to Postal Service customers (Pet. 21 (emphasis in original), quoting *SEC* v. *Sloan*, 436 U.S. 103, 109 (1978), and *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). However, the arbitrator will soon determine petitioners' rights under their collective bargaining agreement with the Postal Service, and, after the arbitration decision is rendered, the propriety of writing letters to Postal Service customers and of disciplining employees who take such action should be clear. It is difficult to see what benefit there is to any party in continuing to litigate this preliminary injunction action.

b. Moreover, the court of appeals' decision is correct. While public employees do not sacrifice their rights as citizens to speak upon matters of public concern, protection of these rights need not cause "intrusive oversight by the judiciary in the name of the First Amendment." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). Here the punishment was based solely upon a letter directed to the Postal Service's customer attributing alleged delays of that customer's mail

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warranted to consider that issue. It is clear, however, that such relief would be inappropriate since it would conflict with the arbitration process.

to the managerial decision to cut back the work force at a particular post office. Even assuming arguendo that this kind of managerial decision rises to the level of a public concern, as the court of appeals somewhat reluctantly concluded (Pet. App. 12a), the court of appeals was certainly correct in rejecting petitioners' vague "chilling argument," which amounted to little more than a conclusory assertion. A preliminary injunction barring discharge of a government employee should be issued only "in the genuinely extraordinary situation." *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974). Lest the government be precluded from ever taking interim disciplinary steps against its employees, public employees must articulate specific injuries to set forth a claim based on chilling of First Amendment rights. See *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972). Finally, the strong policy against premature judicial intervention in labor disputes, especially where the parties have agreed to binding arbitration, strongly militates against the issuance of the injunction. See, *e.g.*, *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

c. Contrary to petitioners' claim (Pet. 10-14), there is no conflict in the circuits. In *Johnson* v. *Bergland*, 586 F.2d 993, 995 (4th Cir. 1978), the court found irreparable injury in part because "without the injunction, the government would be free to name a successor to Johnson * * *, and Johnson would have no means of being reinstated if he should prevail at trial." That is not the case here.[3] The other case petitioners cite, *Purolator Armored, Inc.* v. *NLRB*,

[3] The court in *Johnson* also said that "[v]iolations of first amendment rights constitute per se irreparable injury" (586 F.2d at 995). Whatever the merits of that proposition, the court of appeals here did not disagree with it, concluding instead that petitioners had failed to articulate a First Amendment violation (Pet. App. 12a-13a).

764 F.2d 1423 (11th Cir. 1985), did not involve a preliminary injunction or a First Amendment claim, and is obviously not in conflict with the Second Circuit's decision in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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